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12-31-03

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Examiner:** Patricia Ann Duffy      **Art Unit:** 1645

*In re:*

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SEP 16 2003

**Applicant:** James Brady

**Serial No.:** 09/632,159

**Filed:** April 10, 2001

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**AMENDMENT**

I hereby certify that this correspondence is  
being deposited with the United States  
Postal Service by First Class Mail on the  
date indicated above and is addressed  
to the Assistant Commissioner of Patents  
and Trademarks, Washington, D.C. 20231

10/19/03  
ILYA BOROVSKY

Hon. Commissioner of  
Patents and Trademarks  
Washington, D.C. 20231

Sir:

This amendment is submitted supplementary to the previous  
Amendment. With the 1 Amendment, applicants wish to additionally  
explain to the Examiner the new features of the present invention and to show  
how the present invention patentably distinguishes over the art.

The patent to Matson has a reference to inflammatory mediators,

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such as cytokines, and endotoxins, and discloses a possibility of using various particles. However, it does not disclose a system in which a particulate hemocompatible material includes a first group of macroporous particles which are hydrophobic and positively charged to provide adherence of endotoxins to an inner surface of the particles, and a second group of mesoporous particles which are hydrophobic and not charged so that cytokines and superantigens adhere to an inner surface of the particles of this group, so as to simultaneously purify blood from endotoxins, cytokines and superantigens and thereby to treat serious infections and sepsis. The general statement about the possibility of using certain particles does not provide any hint in the patent to Matson for a particular hemocompatible material which would be similar or identical to the material disclosed in this present application.

The patent to Davankov teaches sorbents for removing blood toxicants, comprising a hypercrosslinked styrene resin with a surface modified to be biocompatible. However, this reference also does not teach the above mentioned new features of the present invention.

The system in accordance with the present invention does not simply deal with passing blood or plasma through a particulate material which has particles for purification of blood or plasma, but instead the present

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invention deals with a system in which the blood or plasma passes through the material with specific particles which are specifically selected in a new, inventive way and have different properties, operate in a different way and used jointly to fight infection and sepsis in an efficient and highly advantageous way.

The references taken singly or in combination with one another would not lead to the applicant's invention and would not make the present invention obvious.

The Examiner's attention is respectfully directed to *Ex parte King*, 146 USPQ 590, 591 (Pat. Off. Bd. App. 1964) which stated:

From the Examiner's detailed application of the reference to each of the claims on appeal to which reference is made it appears that apparatus operating on particular stored data through a particular stored program is regarded by him as patentably no different than a computer, absent such data and program. In other words, if the difference between a general purpose computer and the claims to a special purpose computer can be supplied by merely placing a suitable program in a general purpose machine then the Examiner would deny a patent even though the art contained no suggestion for the preparation of such a program. We do not agree. To deny patent protection to a novel structure it must be shown that the same was obvious at the time the invention was made. A program for a computer which is not made obvious by the prior art but only by appellants' disclosure is not available to teach appellants' invention.

While this decision is related to computers and computer

software, its logic is completely applicable to the present application. In the decision it is stated that a novel structure can not be considered as obvious from general knowledge of computers and programs. In accordance with the present invention, a novel system is proposed which can not be considered as obvious from general knowledge of some materials.

In the decision Arkie Lures, Inc. V. Gene Larew Tackle, Inc. 43 USPQ 2d 1294, 1296 (Fed. Cir. 1997), it was stated:

It is insufficient to establish obviousness that the separate element of the invention existed in the prior art, absent some teaching or suggestion, in the prior art, to combine the elements. Indeed, the years of use of salty bait and of plastic lures, without combining their properties, weighs on the side of unobviousness of the combination. Mr. Larew persisted against the accepted wisdom, and succeeded. The evidence that the combination was not viewed as technically feasible must be considered, for conventional wisdom that a combination should not be made is evidence of unobviousness.

The system of the present invention uses the material which combines special components having different properties. The above mentioned decision clearly shows that such an approach should be considered as unobvious and patentable.

In the decision in re Baird, 29 USPQ 2d 1550, 1552 (Fed. Cir. 1994) it was stated:

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The fact that a claimed compound may be encompassed by a disclosed generic formula does not by itself render that compound obvious. In re Jones, 958 F. 2d 347, 350, 21 USPQ 2d 1941, 1943 (Fed. Cir. 1992) (rejecting Commissioner's argument that "regardless [] how broad, a disclosure of a chemical genus renders obvious any species that happens to fall within it"). Jones involved an obviousness rejection of a claim to a specific compound, the 2-(2-aminoethoxy) ethanol salt of 2-methoxy-3,6-dichlorobenzoic acid (dicamba), as obvious in view of, inter alia, a prior art reference disclosing a genus which admittedly encompassed the claimed salt. We revered the Board's rejection, reasoning that the prior art reference encompassed a "potentially infinite genus" of salts of dicamba and listed several such salts, but that it did not disclose or suggest the claimed salt.

It is believed that this decision is clearly applicable to the situation with the present invention, which clearly shows that the present invention can not be considered as obvious.

In the decision in re Russell, 439 F.2d 1228, 1231, 169 USPQ 426, 428 (C.C.P.A. 1971), it was stated that:

Appellant's position on the law is sound, for even though part of appellant's range of proportions, and all of his ingredients, are suggested by the broad teaching of Wei, if appellant can establish that his relatively narrow ranges yield unexpectedly superior results as against the broad Wei ranges as a whole, appellant will have established unobviousness of the claimed invention.

This decision is completely applicable to the present invention and confirms that the present invention should be considered as patentably distinguishing over the art.

Finally, it is very important to distinguish in the rejections based on obviousness what is the difference between a person having ordinary skill in the art and the inventor. In connection with this, it is advisable to cite the decision Standard Oil Co. v. American Cyanamid Co., 227 USPQ 293, 297 (Fed. Cir. 1985), it was stated that:

The issue of obviousness is determined entirely with reference to a hypothetical "person having ordinary skill in the art". It is only that hypothetical person who is presumed to be aware of all the pertinent prior art. The actual inventor's skill is irrelevant to the inquiry, and this is for a very important skill. Inventors, as a class, according to the concepts underlying the Constitution and the statutes that have created the patent system, possess something-call it what you will-which sets them apart from the workers of ordinary skill, and one should not go about determining obviousness under § 103 by inquiring into what patentees (i.e., inventors) would have known or would likely have done, faced with the revelations of references. A person of ordinary skill in the art is also presumed to be one who thinks along the line of conventional wisdom in the art and is not one who undertakes to innovate, whether by patient, and often expensive, systematic research or by extraordinary insights, it makes no difference which.

The present invention was developed first by the inventors, and in no way it can be considered as obvious for a person of ordinary skill in the art.

Reconsideration and allowance of the present application is most respectfully requested.

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Should the Examiner require or consider it advisable that the specification, claims and/or drawings be further amended or corrected in formal respects in order to place this case in condition for final allowance, then it is respectfully requested that such amendments or corrections be carried out by Examiner's Amendment, and the case be passed to issue. Alternatively, should the Examiner feel that a personal discussion might be helpful in advancing this case to allowance, he is invited to telephone the undersigned (at 631-243-3818).

Respectfully submitted,

  
Ilya Zborowski  
Agent for Applicant  
Reg. No. 28583

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